89-99

No.

Supreme Court, U.S.
FILED
JUL 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARJEC, INC.,

Petitioner,

v.

HOME AND LOT OWNERS ASSOCIATION OF SHAWNEE-LAND, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT M. MUSSELMAN *
413 Seventh Street, N.E.
P.O. Box 254
Charlottesville, Virginia 22902
(804) 977-4500
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the court of appeals err in holding that the appeal from the district court was moot because the petitioner (who seeks to set aside a transfer of property from petitioner's bankruptcy estate) did not obtain a stay of the transfer pending appeal, and because the transfer has been finally accomplished?

PARTIES TO THE PROCEEDING

The Petitioner is Marjec, Inc., which was the appellant before the United States Court of Appeals for the Fourth Circuit. The Respondent is Home and Lot Owners Association of Shawnee-Land, Inc., which was the appellee below.

The Petitioner has no parent corporation and no subsidiaries or affiliates.

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HOME AND LOT OWNERS ASSOCIATION OF SHAWNEE-LAND, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported, and is reprinted in the Appendix hereto ("App.") at 1a. The judgment of the District Court for the Western District of Virginia was entered without opinion. The judgment of the Bankruptcy Court for the Western District of Virginia was entered without opinion. App. 21a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 16, 1989 (App. 4a), and petition for rehearing was denied on March 21, 1989. App. 5a. This Court entered its order on June 20, 1989, granting an extension of time within which to

petition for certiorari to and including July 19, 1989.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case, involving only a finding of mootness, does not involve any constitutional or statutory provisions.

STATEMENT OF THE CASE

This case derived from the effort of the Respondent, Home and Lot Owners Association of Shawnee-Land, Inc. ("HALOAS") to purchase from the bankruptcy trustee certain assets of the bankruptcy estate of the Petitioner, Marjec, Inc. ("Marjec").[2] HALOAS filed a complaint (App. 13a) in the bankruptcy court seeking authority to purchase the bankruptcy estate's interest in certain real estate located at Shawnee-Land Subdivision, Frederick County, Virginia, and also to purchase the estate's claim to future annual maintenance fees (hereinafter referred to as the "dues rights") called for in contracts between Marjec and all lot owners at Shawnee-Land.

HALOAS named as defendants in its adversary complaint Marjec, John G. Leake, as Trustee of the Bankruptcy Estate of Marjec, Inc., and five entities holding lien claims against the real estate which HALOAS sought to purchase. All of the defendants except Marjec filed answers admitting the material allegations of the

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[1] The Order Extending Time to File Petition for Writ of Certiorari (No. A-1022) erroneously identifies Don R. Lamborne as the Petitioner. Don R. Lamborne is president of the Petitioner, Marjec, Inc., but Don R. Lamborne was not a party in the proceeding below.

[2] Marjec's bankruptcy petition was filed prior to October 1, 1979, 1978, and thus is governed by the provisions of the Bankruptcy Act of 1898, former Title 11, United States Code.

complaint and consenting to the sale to HALOAS. Marjec opposed the sale.

Following three days of hearings, the bankruptcy judge entered his order on December 29, 1986 (App. 21a), approving the sale and ordered the trustee to convey to HALOAS the estate's interest in the real estate and the estate's claim to the past, present, and future dues rights. Of note here is the fact that the bankruptcy judge ordered the conveyance of the past dues rights, as well as the present and future dues rights. In its complaint and throughout the hearings, HALOAS had specifically disclaimed any intention or desire to acquire the past dues rights (App. 19a); at no point in the proceedings, prior to the entry of the December 29, 1986 order, were the parties or the creditors given notice or otherwise advised that the bankruptcy judge was even considering the transfer of those assets. It was the lack of notice, coupled with the apparent lack of consideration for the transfer of the past dues rights, which was the basis for Petitioner's subsequent appeal to the District Court.

Upon entry of the order of December 29, 1986, the clerk of the bankruptcy court in Harrisonburg, Virginia duly placed a copy of the order in the mail addressed to Petitioner's counsel in Charlottesville, Virginia. However, Respondent's counsel in Harrisonburg, having learned of the order immediately upon entry, was able to effect consummation of the transfer on December 30, 1986 (App. 10a), the very day that Petitioner's counsel learned of the order, thus having made it physically impossible for Petitioner to even request, much less obtain, a stay of the transfer pending appeal.

On appeal, the District Court granted Respondent's motion to dismiss the appeal, finding that because reversal of the Bankruptcy Court's order could not return the bankruptcy estate to solvency, Marjec had no pecuniary interest in the appeal and thus lacked standing to prosecute it.

On further appeal, the Court of Appeals dealt briefly with the issue of standing, and concluded that that issue need not be reached. Rather, the Court of Appeals affirmed upon a finding of mootness, solely with reference to the fact that Petitioner did not obtain a stay pending appeal and the fact that the transfer was consummated. App. 1a.

EXISTENCE OF JURISDICTION BELOW

The Bankruptcy Court for the Western District of Virginia had jurisdiction over this adversary proceeding under section 2a of the Bankruptcy Act (former 11 U.S.C. § 11a). Marjec's bankruptcy case was commenced before the effective date of the Bankruptcy Code, and thus remains governed by former Title 11, United States Code. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403, 92 Stat. 2683.

REASONS FOR GRANTING THE WRIT

In this case, the Court of Appeals has applied a far-reaching *per se* rule of mootness that deprives interested parties in bankruptcy cases from seeking review of transfer orders without regard to notions of fundamental fairness.

We submit that the holding of the Court of Appeals in this case makes the finality of a bankruptcy court judgment, no matter how erroneous or egregious that judgment may be, dependent not upon considered review by an appellate court, but rather dependent solely upon an unseemly race to complete a sale before the stay can be requested or obtained. Further, it seems logical to assume that the holding will encourage such "races to the courthouse" primarily in those cases where the correctness of the judgment is a matter of serious dispute, thus prohibiting review precisely in those cases where review is most needed.

Where a bankruptcy court orders a trustee to transfer valuable property of the estate without consideration and without giving notice to parties in interest or opportunity to be heard, and where review is denied solely on the grounds that the aggrieved party failed to obtain a stay within a day after the order was entered, even though it was physically impossible to do so, then very serious questions as to the integrity of our judicial system are raised, and citizens are left with confusion over whether we any longer have a government of laws.

Review by this Court is necessary to correct a situation which, if left as is, allows the outcome of serious legal issues to be ultimately determined by a breakneck race to the courthouse, and turns the operation of law into a mere game, and a game of very questionable fairness at that. Given the circumstances of this case, the Court of Appeal's denial of review on grounds of mootness violated all notions of fundamental fairness. The appeal should have been decided by squarely addressing the issues raised in the District Court, and not by finding refuge in a patently unfair technicality.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT M. MUSSELMAN *
413 Seventh Street, N.E.
P.O. Box 254
Charlottesville, Virginia 22902
(804) 977-4500
Counsel for Petitioner

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3093

HOME AND LOT OWNERS ASSOCIATION OF SHAWNEE-LAND, INC.,
Plaintiff-Appellee,

v.

MARJEC INC.,
Defendant-Appellant,

and

JOHN G. LEAKE, Trustee; COUNTY OF FREDERICK, VIRGINIA; SMALL BUSINESS ADMINISTRATION, An Agency of the U. S.; ESTATE OF NICHOLAS C. MILLER; JOSEPH A. MASSIE, JR.; GEORGE C. SNARR, JR., ESQ.,
Defendants.

Appeal from the Western District of Virginia at Harrisonburg
James H. Michael, Jr., District Judge. (C/A-87-46)

Argued: January 10, 1989 Decided: February 16, 1989

Before WILKINS, Circuit Judge, BUTZNER, Senior Circuit Judge, and MOTZ, United States District Judge for the District of Maryland, sitting by designation.

Robert Metcalfe Musselman (Roger K. Grillo, ROBERT M. MUSSELMAN & ASSOCIATES, on brief) for Appellant. Dale Alan Davenport (HOOVER, HOOVER, PENROD & DAVENPORT, on brief) for Appellee.

PER CURIAM:

This appeal concerns a Bankruptcy Court order directing that certain accounts receivable allegedly due to the debtor, Marjec, Inc. (the developer of Shawnee-Land, a residential community in Frederick County, Virginia) be transferred to the Home and Lot Owners Association of Shawnee-Land, Inc. (a non-profit corporation representing the interest of various individual property owners at Shawnee-Land). The District Court found that because reversal of the Bankruptcy Court's order could not return the bankruptcy estate to solvency, Marjec had no pecuniary interest in the appeal and thus lacked standing to prosecute it. *See Willemain v. Kivitz*, 764 F.2d 1019 (4th Cir. 1985).

Marjec argues before us that since reversal of the Bankruptcy Court's order would potentially reduce its nondischargeable liabilities, it does have a sufficient pecuniary interest in the outcome of the appeal to possess standing. *See Caldwell v. Armstrong*, 342 F.2d 845 (10th Cir. 1965); *Menick v. Hoffman*, 205 F.2d 365 (9th Cir. 1953); *In Re Kaminsky*, 286 F.Supp. 445 (E.D. Wis. 1968). The Home and Lot Owners Association argue that the cases relied upon by Marjec are distinguishable because they involved individual debtors whereas Marjec is a corporation whose insurmountable financial difficulties have for all practical purposes brought its existence to an end. *See In Re J. N. Wells, Inc.*, 575 F.2d 329 (1st Cir. 1978); *Hartman Corporation of America v. United States*, 304 F.2d 429 (8th Cir. 1962).

We need not reach the issue thus posed. The transfer of the accounts receivable in question have been effected by a recorded deed. Marjec did not obtain a stay of the

transfer pending appeal and in light of the fact that the transfer has been finally accomplished, the appeal is moot. *See, e.g. Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92, 96 (4th Cir. 1988); *In re National Homeowners Sales Service Corp.*, 554 F.2d 636, 637 (4th Cir. 1977); *In re Abingdon Realty Corp.*, 530 F.2d 588, 590 (4th Cir. 1976).

Affirmed

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3093

HOME AND LOT OWNERS ASSOCIATION OF SHAWNEE-LAND, INC.,
(Bankruptcy Case No. 78-00245(H)
Plaintiff-Appellee,

v.

MARJEC INC.,
Defendant-Appellant,

and

JOHN G. LEAKE, Trustee; COUNTY OF FREDERICK, VIRGINIA; SMALL BUSINESS ADMINISTRATION, An Agency of the U. S.; ESTATE OF NICHOLAS C. MILLER; JOSEPH A. MASSIE, JR.; GEORGE C. SNARR, JR., ESQ.,
Defendants.

JUDGMENT

APPEAL FROM the United States District Court for the Western District of Virginia at Harrisonburg.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia at Harrisonburg and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, Affirmed.

/s/ John M. Greacen
Clerk

A True Copy: Teste:

John M. Greacen, Clerk

By /s/ Jean [Illegible]
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3093

HOME AND LOT OWNERS ASSOCIATION
OF SHAWNEE-LAND, INC.,
Plaintiff-Appellee,

v.

MARJEC, INC.,
Defendant-Appellant.

ON PETITION FOR REHEARING

[Filed Mar. 21, 1989]

Upon consideration of appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of District Judge Motz, United States District Judge sitting by designation, with the concurrence of Judge Wilkins and Senior Judge Butzner.

For the Court

/s/ James M. Greacen
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3093

HOME AND LOT OWNERS ASSOCIATION
OF SHAWNEE-LAND, INC.,
Plaintiff-Appellee,

v.

MARJEC, INC.,
Defendant-Appellant,

and

JOHN G. LEAKE, Trustee; COUNTY OF FREDERICK, VIRGINIA, SMALL BUSINESS ADMINISTRATION, An Agency of the U. S.; ESTATE OF NICHOLAS C. MILLER; JOSEPH A. MASSIE, JR.; GEORGE C. SNARR, JR., Esquire,
Defendants.

PETITION FOR REHEARING

Comes now the appellant, Marjec, Inc., by counsel, and moves this Court to reconsider its decision herein dated February 16, 1989.

STATEMENT OF COUNSEL

Counsel for appellant respectfully submits that, in counsel's judgment, this Court, in ruling that the appeal is moot overlooked a material fact, to-wit: The transfer in question having been made the day immediately after the entry of the bankruptcy court's clearly erroneous order authorizing the transfer of property specifically not re-

quested by the transferee, it was physically impossible for appellant to obtain a stay prior to the accomplishment of the transfer.

FACTS

The facts relevant to the mootness issue are as follows. The bankruptcy court entered its order authorizing the transfer on December 29, 1986. Upon entry of the order, the clerk of the bankruptcy court in Harrisonburg, Virginia, duly placed a copy of the order in the mail addressed to appellant's counsel in Charlottesville, Virginia. However, appellee's counsel in Harrisonburg, having learned of the order immediately upon entry, was able to effect consummation of the transfer on December 30, 1986, the very day that appellant's counsel learned of the order. Copies of the instruments of conveyance are attached hereto as Exhibits A, B, and C.

ARGUMENT

IS IT THE CONSIDERED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT THAT A CLEARLY ERRONEOUS ERROR OF THE BANKRUPTCY COURT SHOULD BE RENDERED UNREVIEWABLE SIMPLY BECAUSE ONE PARTY LITERALLY WON A RACE TO THE COURTHOUSE ON THE DAY AFTER THE ERRONEOUS JUDGMENT WAS ENTERED?

Where a bankruptcy court orders a trustee to transfer valuable property of the estate without consideration and without giving notice to parties in interest or opportunity to be heard, and where this Court refuses to review this egregious ruling on the grounds that the appellant failed to obtain a stay within a day after the order was entered, even though it was physically impossible to do so, very serious problems as to the integrity of our judicial system are raised, and citizens are left with con-

fusion over whether we any longer have a government of laws.

Even if appellant's counsel had learned of the order when it was entered, it would have been impossible to obtain a stay by the next day, given the time required to draft pleadings, contact a judge, schedule and conduct a hearing, and so forth. Nor can it be said that appellant's counsel should have anticipated that an immediate stay would be required, inasmuch as counsel had no inkling that the bankruptcy court would authorize a transfer that had not even been requested by a party in interest, and for which no notice or opportunity to be heard had been given.

By allowing the outcome of this case to be ultimately determined by a breakneck race to the courthouse, this Court's decision of February 16, 1989, has turned the operation of law into a mere game, and a game of very questionable fairness at that. Given the unique circumstances of this case, the Court's denial of review on grounds of mootness violates all notions of fundamental fairness. This appeal should be decided by squarely addressing the issues raised in the court below and not by finding refuge in a patently unfair technicality.

CONCLUSION

For the reasons stated above, this Court should reconsider and vacate its decision of February 16, 1989.

MARJEC, INC.

By /s/ Roger K. Grillo
Counsel

Roger K. Grillo
ROBERT M. MUSSELMAN & ASSOCIATES
413 Seventh Street, N.E. (P.O. Box 254)
Charlottesville, Virginia 22902
(804) 977-4500
Counsel for Defendant/Appellant

CERTIFICATE

The undersigned hereby certifies that a copy of the foregoing Motion for Reconsideration was mailed this 1st day of March, 1989, to Dale A. Davenport, Esquire, HOOVER, HOOVER, PENROD & DAVENPORT, 342 South Main Street, Harrisonburg, Virginia 22801.

/s/ Roger K. Grillo

EXHIBIT A

RELEASE AND EXTINGUISHMENT OF DUES OBLIGATIONS

WHEREAS Marjec, Inc., a Maryland corporation t/a Shawmee-Land, from time to time in the ordinary course of its business of the sale of real estates entered into certain contracts or agreements with purchasers of tracts or lots of real estate from Marjec, Inc.; and

WHEREAS said contracts purport to create a legal obligation which requires the purchaser to pay to Marjec, Inc. certain maintenance fees and dues (hereinafter collectively referred to as dues rights) for so long as the purchaser owns the real estate purchased from Marjec, Inc., and which contractual provision is deemed to survive the delivery and recording of any deed from Marjec, Inc. to said purchaser; and

WHEREAS on September 14, 1978, Marjec, Inc. filed a petition for relief under the provisions of Chapter XI of the Bankruptcy Act of 1898 in the United States Bankruptcy Court for the Western District of Virginia (Harrisonburg Division); and

WHEREAS by Order entered on June 8, 1983, said Court converted the proceedings in the case of Marjec, Inc., debtor, to a proceeding under the provisions of Chapter IV of the Bankruptcy Act; and

WHEREAS by Order entered on July 31, 1984, John G. Leake was appointed as Trustee of the debtor's estate and has duly qualified as such, as evidenced by the Order attached hereto; and

WHEREAS on August, 1986, the Home and Lot Owners Association of Shawnee-Land, Inc. (hereinafter referred to as HALOAS) commenced an action in said Bankruptcy Court, by Complaint styled "HALOAS v. John G. Leake, Trustee, et als. Complaint No. 16" and

which Complaint requests the entry of an Order authorizing the Trustee to sell to HALOAS, among other items of property, the aforesaid "dues rights"; and

WHEREAS after notice and a hearing upon said Complaint, said Bankruptcy Court on December 29, 1986, entered an Order approving the Trustee's sale of said property, including the dues rights, to HALOAS, and further, directing the Trustee to "quitclaim unto [HALOAS] all right, title and interest of Marjec, Inc. and to all past, present and future dues rights of past, present and future owners of lots in Shawnee-Land by contract or recorded instrument which quitclaim of said dues rights shall be upon condition that the same shall be extinguished by [HALOAS] by instrument duly executed and recorded in the Clerk's Office of Frederick County, Virginia by [HALOAS]",

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that for good and sufficient consideration, and pursuant to the Order of the United States Bankruptcy Court for the Western District of Virginia (Harrisonburg Division) entered on December 29, 1986, and Home and Lot Owners Association of Shawnee-Land, Inc., does hereby RELEASE, DISCHARGE, AND EXTINGUISH unto all past, present and future owners of lots of real estate within the Shawnee-Land subdivision, all past, present, and future dues rights.

WITNESS the following signature and seal:

Home and Lot Owners of Shawnee-Land, Inc.

By its President

Name William L. Still

Title President

COMMONWEALTH OF VIRGINIA

CITY OF HARRISONBURG, to wit:

The foregoing instrument was acknowledged before me this 30th day of December, 1986, by William L. Still, its President, on behalf of the Home and Lot Owners Association of Shawnee-Land, Inc.

My Commission expires: December 22, 1989

/s/ L. Ruth Jordan
Notary Public

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Case No. 78-00245(H)

IN RE MARJEC, INC.,
Debtor,

HOME AND LOT OWNERS ASSOCIATION
OF SHAWNEE-LAND, INC.,
Plaintiff,

v.

JOHN G. LEAKE, TRUSTEE
COUNTY OF FREDERICK, VIRGINIA,
THE SMALL BUSINESS ADMINISTRATION,
an agency of the United States of America,
ESTATE OF NICHOLAS MILLER,
JOSEPH A. MASSIE,
GEORGE C. SNARR, JR. and MARJEC, INC.,
Defendants.

COMPLAINT TO SELL PROPERTY OF THE BANKRUPTCY ESTATE FREE AND CLEAR OF LIENS

[Filed Aug. 4, 1986]

TO THE HONORABLE THOMAS J. WILSON, III, JUDGE OF THE COURT:

Comes now the Home and Lot Owners Association of Shawnee-Land, Inc., by counsel, and for this Complaint respectfully says:

1. This court has jurisdiction over this adversary proceeding pursuant to the provisions of the Bankruptcy Act and Rule 6004 of the Rules of Bankruptcy Procedure.

2. The bankrupt, Marjec, Inc., filed a proceeding under Chapter XI of the Bankruptcy Act on September 14, 1978. Later, the case was converted to a liquidating Chapter IV case. The trustee, John G. Leake, was appointed trustee in July of 1984.

3. The plaintiff has proposed an offer to the trustee to purchase certain real property and improvements thereon located within the Shawnee-Land subdivision, commonly known as "the common property", and the roads which are platted throughout the subdivision with the exception of certain roads in Section 50 on top of the mountain. The plaintiff also has proposed to purchase the so-called "dues rights" under which the Marjec bankruptcy estate has for many years collected monies from property owners at Shawnee-Land for the maintenance of the common properties. The purchase price for the common property and the roads (hereinafter "the Property") and the dues rights is Five Thousand Dollars ($5,000.00). The trustee has indicated his willingness to accept this offer, subject to authorization by this Court. A copy of the offer is attached hereto as Exhibit A.

4. The defendants are persons believed to be all of the lienholders in the Property as set forth below:

a. The County of Frederick enjoys a first lien position in the Property by virtue of Section 58.1-3340, Code of Virginia, 1950, as amended, in the approximate amount of Twenty Thousand Dollars ($20,000.00).

b. The Small Business Administration has a deed of trust lien in the common properties and certain roads, securing indebtedness in the approximate amount of One Hundred Ninety Thousand Dollars ($190,000.00). The trust is recorded in the Clerk's Office of the Circuit Court of Frederick County in Deed Book 492, at Page 102.

c. The Estate of Nicholas C. Miller has a deed of trust lien in the common properties, securing indebtedness in the approximate amount of Six Hundred Thou-

sand Dollars ($600,000.00). The trust is recorded in the said Clerk's Office in Deed Book 478, at Page 111.

d. Joseph A. Massie and George C. Snarr, Jr., as successors in interest to the law firm of Massie & Snarr, have a deed of trust lien on the common properties and roads, securing indebtedness in the approximate amount of Nineteen Thousand Dollars ($19,000.00). The trust is recorded in the said Clerk's Office in Deed Book 486, at Page 141.

5. The plaintiff has obtained written agreements and consents to this proposed sale of the Property from the Small Business Administration, the Estate of Nicholas C. Miller, and Joseph A. Massie and George C. Snarr, Jr. Copies of those agreements are attached hereto as Exhibits B, C, and D.

6. An appraisal made in 1981 by Dominion Appraisers, which has been made part of the record in this case, concluded that there was no market demand for the Property except for a 14.03 acre improved parcel which was valued at $34,500.

7. The dues rights have no value at the present time because they are required to be substantially used for the maintenance of the Property. The dues rights will have no value in the future if the Property is sold as requested in this Complaint because the bankruptcy estate would be unable to collect dues if the Property were sold.

8. The liens against the Property far exceed its value.

9. The remainder of the undeveloped land in Shawnee-Land, and certain lots which were owned by the bankruptcy estate and others, have been sold at public auction by the Estate of Nicholas C. Miller, pursuant to a prior order of this Court, and the sale has been confirmed by this Court. As a result, the debtor has no realistic chance of rehabilitation.

10. At the present time, the Property is in a very poor state of repair and continues to deteriorate. Collection of dues continues to decline due to the lack of confidence of the property owners in the current situation and the outlook for the future.

11. The contractual agreements with defendants the Small Business Administration, the Estate of Nicholas C. Miller, and Joseph A. Massie and George C. Snarr, Jr., as set forth in Exhibits B, C, and D, provide that those lienholders will release their liens, upon certain conditions set forth therein, if this Court approves the purchase of the properties and the dues rights. The plaintiff wishes to take the property subject to the lien of the County of Frederick.

12. The plaintiff is contractually bound with the Small Business Administration to transfer the Property to a sanitary district for the Shawnee-Land area, or a similar non-profit organization, to maintain the roads and amenities for the benefit of all residents in Shawnee-Land, if such is possible.

13. The plaintiff has sponsored the formation of a sanitary district for Shawnee-Land. A petition has been filed in the Circuit Court of Frederick County, Virginia which requests the entry of an order forming a sanitary district. A copy of the petition is attached hereto as Exhibit E.

14. If this court authorizes the proposed purchase of the Property and dues rights, the plaintiff will transfer the Property to such a sanitary district or similar non-profit organization so that the Property can be adequately maintained for all residents of Shawnee-Land in the future.

15. As soon as practicable after the establishment of a sanitary district for Shawnee-Land and the transfer of the Property to it, the plaintiff will cancel the dues rights so that the costs of maintenance of the Property can be

paid by taxes and charges authorized by Virginia law as such are determined and estabilshed by the sanitary district.

16. The administrative claimants and/or secured creditors of the Marjec, Inc. bankruptcy estate will receive more from the proposed purchase of the Property and the dues rights than they will from any other disposition of those assets.

17. Pursuant to Rule 2002 of the Rules of Bankruptcy Procedure, notice of this Complaint to sell property free and clear of certain liens was mailed first-class, postage prepaid, to all creditors and other parties in interest in this case.

WHEREFORE, the Home and Lot Owners Association of Shawnee-Land, Inc. requests that this court enter an order as follows:

A. Authorizing John G. Leake, trustee of Marjec, Inc., to sell the common property, the roads, and the dues rights of the Marjec, Inc. bankruptcy estate free and clear of all liens except the lien of the County of Frederick to the Home and Lot Owners Association of Shawnee-Land, Inc., in accordance with the terms of the offer to purchase (which is attached hereto as Exhibit A);

B. Authorizing John G. Leake, Trustee, to execute all documents necessary to convey with Special Warranty of title to the Home and Lot Owners Association of Shawnee-Land, Inc. the common properties, roads and due rights as specified in the offer of purchase (which is attached hereto as Exhibit A); and

C. For other appropriate relief.

Respectfully submitted,

HOME AND LOT OWNERS OF
SHAWNEE-LAND, INC.

By Counsel

/s/ Dale A. Davenport
Dale A. Davenport, Esquire
HOOVER, HOOVER, PENROD & DAVENPORT
342 South Maine Street
Harrisonburg, VA 22801
Counsel for the Plaintiff

EXHIBIT A

HOOVER, HOOVER, PENROD & DAVENPORT
ATTORNEY AT LAW

342 South Main Street
Harrisonburg, Virginia 22801

August 4, 1986

John G. Leake
Trustee of Marjec, Inc.
P. O. Box 526
Harrisonburg, VA 22801

Re: Purchase of common properties, roads and dues rights at Shawnee-Land

Dear John:

As you know, I represent the Home and Lot Owners Association of Shawnee-Land, Inc. My client is interested and in this letter will propose to purchase from the Marjec bankruptcy estate the real estate and improvements known as the common properties (as described in the March 17, 1981 appraisal by Dominion Appraisers), the roads which are platted throughout the subdivision, except those roads south of the electric transmission line right-of-way, and the so-called "dues rights".

My client offers for these assets to pay to you as trustee the sum of Five Thousand Dollars ($5,000.00), to be paid in full upon execution and delivery of a special warranty deed for the common properties and roads, and an assignment of the dues rights.

We do not seek to acquire any rights which the bankruptcy estate may have to collect past dues which were not paid. We are only interested in acquiring the rights which the bankruptcy estate may have to collect dues in the future.

We wish to transfer the common properties and the roads to a sanitary district which we are in the process of organizing for Shawnee-Land. Once the district is established, HALOAS will cancel the dues rights.

My client would bear all the costs of these transfers. We would prepare the deed and would obtain an adequate metes and bounds description or other general description, which we would review with you and your counsel to ensure that it is satisfactory to you prior to closing. Closing would occur as soon as possible after approval by the bankruptcy court.

If you are in agreement with this proposal we would appreciate your so indicating by signing the enclosed copy of this letter and returning it to me. Of course, this proposal is subject to approval by the bankruptcy court. We will file a complaint to obtain approval for this purchase and will provide for proper notice to interested parties.

Very truly yours,
HOOVER, HOOVER, PENROD & DAVENPORT

/s/ Dale Davenport
DALE A. DAVENPORT

DAD/lrj

cc: William Still, President, HALOAS

I agree to the terms of this proposal subject to authorization and approval by the bankruptcy court.

/s/ John G. Leake
JOHN G. LEAKE, Trustee of Marjec, Inc.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Case No. 78-00245

Complaint No. 16

IN RE: MARJEC, INC.,

Debtor

HOME AND LOT OWNERS ASSOCIATION OF SHAWNEE-LAND, INC.,

Plaintiff,

v.

JOHN G. LEAKE, TRUSTEE, *et als.*,

Defendants.

ORDER

The Home and Lot Owners Association of Shawnee-Land, Inc. filed its Complaint herein against John G. Leake, Trustee, and others seeking to purchase for the sum of $5,000.00 from said Trustee the real property with improvements located at Shawnee-Land Subdivision known as the "common property", and the roads which are platted throughout the subdivision with the exception of certain roads in Section 50 on top of the mountain, and the so-called "dues rights" under which Marjec has for years collected money from owners at Shawnee-Land. Said offer is attached to the Complaint as Exhibit A. The offer contemplated that any conveyance by the Trustee would be subject to existing real estate taxes and liens binding the property, particularly that of the Small Business Administration on the so-called "common property", Plaintiff having apparently made arrangements with the various lienholders for releases to suit Plaintiff's purposes.

At the hearing upon this Complaint, it became apparent to the Court that the lien of the Small Business Administration which up to that time was considered by all parties, with the exception of Lambourne, to be a first lien, with the exception of taxes, on the so-called "common property" was, in fact, a first lien only on that portion of the "common property" embraced within what is known as the Myers Tract as described in the Small Business Administration deed of trust, with exceptions therefrom, and embraces only some forty (40) acres.

The Court is of the opinion that the roads in the Shawnee-Land Subdivision, which the Court takes to include the roads shown on the various plats recorded from time to time, have no market value and are subject to whatever rights may exist in lot owners by contract or otherwise for the use of the same; that the portion of the common area embraced within the Myers Tract and covered by the Small Business Administration lien has no equity for the benefit of general creditors; and that the so-called "dues rights" as may be due or to become due and which may effect as many as 2,800 lot owners are in all probability not enforceable in law or equity, at the least by reason of this Chapter IV proceeding, and should be extinguished to avoid the possibility of multiple vexatious claims for small amounts against so many owners, the Court does, accordingly, ADJUDGE and ORDER that said offer of $5,000.00 be approved subject to the following conditions, and the Trustee is authorized and directed upon the payment to him of the sum of $5,000.00 by Plaintiff to:

1) Execute and deliver his quitclaim deed as Trustee for Marjec, Inc. to the common property with improvements which are included within the so-called Myers tract with a good and sufficient survey description therefor to be furnished him by and at the expense of the Plaintiff. Said conveyance is to be made subject to the assumption by the Plaintiff of all current and past due real estate taxes to the exoneration of the Estate of Marjec, Inc.

2) Execute and deliver his quitclaim deed for all platted roads shown upon the Shawnee-Land Subdivision as platted of record in the Clerk's Office of Frederick County, Virginia, with the exception of the roads platted in Section 50 of Shawnee-Land Subdivision.

3) Quitclaim unto Plaintiff all right, title and interest of Marjec, Inc. and to all past, present and future dues rights of past, present and future owners of lots in Shawnee-Land by contract or recorded instrument which quitclaim of said dues rights shall be upon the condition that the same shall be extinguished by the Plaintiff herein by instrument duly executed and recorded in the Clerk's Office of Frederick County, Virginia, by Plaintiff.

ENTER: December 29, 1986. (9:30 a.m.)

/s/ Thomas J. Wilson
THOMAS J. WILSON
U.S. Bankruptcy Judge

APPENDIX F

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Case No. 78-00245 (II)

IN RE MARJEC, INC.,
t/a SHAWNEE-LAND*

Debtor, Soc. Sec. No. ————————

ORDER APPROVING TRUSTEE'S BOND

The bond filed by John C. Leake of ** Harrisonburg, Virginia as trustee of the estate of the above-named debtor is hereby approved.

Dated: August 15, 1984

BY THE COURT

/s/ Thomas J. Wilkinson
THOMAS J. WILKINSON
Bankruptcy Judge

[ILLEGIBLE]

/s/ ILLEGIBLE

[SEAL]

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* Include all names used by debtor within last 6 years.

** State post office address.

Supreme Court, U.S.
FILED
AUG 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-99

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MARJEC, INC.,
Petitioner,
v.
HOME AND LOT OWNERS ASSOCIATION
OF SHAWNEE-LAND, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

DALE A. DAVENPORT *
342 South Main Street
Harrisonburg, Virginia 22801
(703) 433-2444
Counsel for the Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Respondent accepts the Petitioner's statement of the question presented.

PARTIES TO THE PROCEEDING

The Respondent accepts the Petitioner's statement of the parties.

The Respondent has no parent corporaton, subsidiaries or affiliates.

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---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Respondent accepts the Petitioner's statement of the opinions below.

JURISDICTION

The Respondent accepts the Petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The judicial power shall extend to all cases, in law and equity, arising under . . . the laws of the United States . . . ." U.S. Const. art. III, § 2.

COUNTERSTATEMENT OF THE CASE

The Petitioner, Marjec, Inc., ("Marjec") the developer of Shawnee-Land, a 3,500 lot subdivision in Frederick County, Virginia, filed bankruptcy in 1978. After waiting eight years without results for Marjec to reorganize, the Home and Lot Owners Association of Shawnee-Land, Inc. ("HALOAS") sought to buy from Marjec's trustee the common property and roads in the subdivision and all future rights of Marjec to payments by lot owners of maintenance monies ("due rights"). This was the first step in a HALOAS plan to rehabilitate the subdivision. HALOAS intended to petition the state court for the formation of a sanitary district[1], transfer the common property and roads to that district and cancel the dues rights. This would leave the sanitary district as the provider of common maintenance in the subdivision, replacing Marjec which had defaulted in the performance of that maintenance due to its financial problems. (Petition, pp. 16a-17a)

The trustee and lien creditors supported the proposed sale of the roads, common property and dues rights; only Marjec was opposed. During the three days of hearings in the bankruptcy court, the judge raised the issue of the past dues rights, which HALOAS had not asked to purchase. Marjec has stated in its Petition that the parties were not advised that the past dues rights might be included in the bankruptcy court order, but as the District Court noted, before the case was over in bankruptcy court it was obvious to Marjec that all the dues rights, past and future, were involved. (App., p. 2a)

The bankruptcy judge determined that no equity existed in the common property and that the roads had no market value, and authorized the sale to HALOAS.

---

[1] In Virginia, a sanitary district is a special taxing district administered as a division of county government and empowered to provide a wide variety of municipal services to persons within the district.

He also found all of the dues rights unenforceable because of Marjec's bankruptcy. He directed the trustee to transfer to HALOAS the past dues rights, as well as the present and future rights, on the condition that they all be canceled in the local land records, to avoid the possibility that lot owners would be harassed by lawsuits at some later time. (Petition, p. 22a)

The bankruptcy court sale order containing the cancellation provisions was entered early on December 29, 1986 and HALOAS, which had been checking with the bankruptcy clerk daily, learned of it around noon that day. The transfer and release instruments for the dues rights and the deed for the roads and common property were executed in the late afternoon of December 30 and were recorded in the Clerk's Office of the Circuit Court of Frederick County shortly after 9:00 a. m. on December 31st. Marjec appealed the sale order but never sought a stay. Marjec has never contended that HALOAS acted wrongfully in accepting the transfer instruments from the trustee or promptly recording those instruments and the release instrument as directed by the court order.

In July, 1987 a sanitary district was created for the subdivision by the state court as a special taxing entity of Frederick County. The real property HALOAS had acquired from the trustee was conveyed to the sanitary district, and the district commenced maintenance activity on the roads and common properties, funded by a tax on the real estate in the subdivision. (App., pp. 3a-4a)[2]

SUMMARY OF ARGUMENT

Two of the key facts upon which Petitioner bases its argument for review were found by lower court judges to be contrary to Petitioner's statement in its petition.

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[2] The affidavit of the Frederick County Administrator partially reproduced in the appendix to this brief was submitted to the district court as a supplement to HALOAS's motion to dismiss the appeal.

A third key fact is not fully developed in the record. This Court would have to first deal with these factual disputes and omissions before reaching the question presented.

Further, this Court should not review this case because the legal issue involved is of no wide import and is limited to the peculiar facts of this case.

Moreover, the Court of Appeals was correct in finding the case moot because so much occurred after the bankruptcy sale order that no court can at this late date restore the persons affected to their prior positions.

Lastly, the action taken by the bankruptcy court in ordering the cancellation of the dues rights was a just, common-sense solution to a practical problem. It kept some future holder of the dues rights from exacting money from unsophisticated lot owners who might pay upon demand even though Marjec's bankruptcy had rendered the dues rights unenforceable. No problem with the maintenance of common properties has arisen from the cancellation of the dues rights, because the creation of a sanitary district has since provided an alternative method of maintaining the roads and common properties.

REASONS FOR NOT GRANTING THE WRIT

I. MARJEC'S CLAIM IS BASED UPON DISPUTED OR UNCLEAR FACTS.

There are three factual components in Marjec's claim: (a) lack of notice that the past dues rights were to be transferred, (b) lack of consideration for the transfer of the past dues rights, and (c) a race to the courthouse won by HALOAS. Marjec argues that these three circumstances together merit an exception to the usual rule that a finally accomplished transfer is moot and not subject to appeal.

The first two allegations conflict with statements of judges who heard the case and its appeal. The district court said that Marjec knew the past dues rights were being considered by the bankruptcy court. The bankruptcy court found the dues rights probably were unenforceable, which clearly shows that they were not "valuable property" as Marjec contends. As to the third allegation, there is nothing in the record to show whether Marjec learned quickly that the dues rights were released and actually felt precluded from obtaining a stay, or whether it learned of the release recordation at a much later time, after it had failed to ask for a stay for some other reason. Even after the release instrument was recorded, Marjec could have requested that a copy of a stay order be recorded and referenced against the release instrument. Bankruptcy Rule 8005. That would have warned third parties not to rely on the release instrument and alerted them to the appeal.

These problems create a disorderly factual background which would prevent this Court from easily addressing the question presented.

II. THIS CASE DOES NOT RAISE AN ISSUE OF WIDE IMPORTANCE, BUT RATHER PRESENTS A QUESTION ARISING FROM A CONFLUENCE OF UNUSUAL FACTS.

The basic complaint of Marjec is that a bankruptcy court directed a trustee to sell estate assets not sought or paid for, which coupled with the purchaser's early awareness of the sale order entry permitted the consummation of the transaction before the debtor could arrange a stay pending appeal. These facts are unusual and unlikely to occur again. The issue that Marjec says arises from them does not merit review by this Court.

III. THE COURT OF APPEALS DECIDED THIS CASE CORRECTLY.

Even if Marjec's allegations of lack of notice, lack of consideration and a race to the courthouse were correct, the case would still be moot because the transfer and release cannot now be undone. It will soon be three years since the transfer and release instruments were recorded in the land records, and any judicial effort to turn back the clock would only hurt the many other persons who have been entitled to rely upon the public record. The Court of Appeals rightly saw that the matter had developed too far and was no longer a case or controversy susceptible of judicial correction. U.S. Const. art. III, § 2; *Mills v. Green*, 159 U.S. 651, 653; 16 S.Ct. 132, 133; 40 L.Ed. 293(1895); *Heitmuller v. Stokes*, 256 U.S. 359, 362; 65 L.Ed. 990; 41 S.Ct. 522(1921); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n.3; 11 L.Ed. 2d 347; 84 S.Ct. 391(1964).

IV. THE BANKRUPTCY COURT ORDER WAS FAIR AND PRACTICAL.

The bankruptcy court order resulted in the cancellation of the dues rights which only could have been used to harass the lot owners. Marjec's bankruptcy and its failure to properly maintain the subdivision had much earlier constituted a breach of its part of the dues agreements with the lot owners. Yet the bankruptcy court knew that if dunning letters were sent out, probably some of the less informed or more timid lot owners would pay. Such an inequitable result was to be prevented, if possible, and the bankruptcy judge wisely took the opportunity to do so. The establishment of the sanitary district with its taxing powers under Virginia law ensured that the roads and common properties will be adequately maintained in the future. The sanitary district has become a far superior replacement for Marjec, which had not adequately provided for the maintenance of the roads and common properties since it filed bankruptcy in 1978.

CONCLUSION

It is respectfully submitted that Marjec's petition for a writ of certiorari should be denied for the reasons stated above.

Respectfully submitted,

DALE A. DAVENPORT *
342 South Main Street
Harrisonburg, Virginia 22801
(703) 433-2444
Counsel for the Respondent

* Counsel of Record

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Bankruptcy No. 78-00245
Civil Action No. 87-0046-H

HOME AND LOT OWNERS ASSOCIATION
OF SHAWNEE-LAND, INC.,
Plaintiff

VS

JOHN G. LEAKE, Trustee, *et al.*,
Defendant

April 11, 1988
4:00 p.m.

(COPY)

TRANSCRIPT OF HEARING BEFORE
THE HONORABLE JAMES H. MICHAEL, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

HOOVER, HOOVER, PENROD & DAVENPORT, ESQS.
Harrisonburg, Virginia
By: DALE A. DAVENPORT, ESQ.

Counsel on behalf of Plaintiff

ROBERT M. MUSSELMAN, ESQ.
Charlottesville, Virginia

Counsel on behalf of Defendant Marjec, Inc.

WHARTON ALDHIZER & WEAVER, ESQS.
Harrisonburg, Virginia
By: WILLIAM E. SHMIDHEISER, III, ESQ.

Counsel on behalf of Defendant Estate of Nicholas C. Miller

THE COURT: . . . . On the issue which Mr. Mussleman [sic] raises about failure to comply, and I use this word though he didn't, precisely with the rules and I'm not sure there has been a failure to comply at this point. It seems to the court that while the initial notice order and so on resulted in the court directed the transfer to HILOAS [sic] of what was the common properties, road and maintenance fee charges with that further instruction to strike them may well have gone beyond that original notice.

But then on the petition of the appellete [sic] a re-hearing was had, and at that time it had to be obvious to the petitioner for re-hearing that the common properties, the roads and the mainetance [sic] fee charges were involved in what the bankruptcy court chose to enter so that there was no being taken by surprise in terms of the second or the granted re-hearing.

And of course, in the granted re-hearing the bankruptcy court re-affirmed its previous view. Had there been no re-hearing, I think Mr. Musselman's [sic] case would have been stronger. But here there was that opportunity afforded to speak to those elements in the bankruptcy court's judgment, which presumably some of which were not included in the notice and the original notice of hearing.

AFFIDAVIT

STATE OF VIRGINIA AT LARGE

CITY OF WINCHESTER, to-wit:

I, John R. Riley, Jr., of Winchester, Virginia, being first duly sworn, make oath that the following information is true and correct to the best of my knowledge, information and belief:

1. I am the County Administrator for Frederick County, Virginia and in such capacity am charged with the general administration of all aspects of County government. As a result of my duties, I have detailed knowledge of the circumstances and facts described in this affidavit.

2. On July 29, 1987, the Circuit Court for Frederick County entered an order establishing a sanitary district over several thousand acres in Western Frederick County, being the developed portion and a substantial amount of undeveloped lands of the Shawnee-Land Subdivision. It is my understanding that Marjec, Inc. has sought an appeal of that order from the Virginia Supreme Court but no stay or injunction which would interfere or impede the formation and operation of the sanitary district has been entered by any Court.

* * * *

6. The Sanitary District is now in full operation as a division of the County government. Separate accounts, bookkeeping records and general business records have been established; the Board of Supervisors has adopted a budget for the current operating year.

7. Presently, a general billing of Sanitary District assessments is being made bi-annually. A billing has been mailed for the last half of 1987 and approximately $160,000 have been received by the County on that bill-

ing. The next billing is set for May of 1988 which will cover the period from January through June of 1988.

8. During the Winter of 1987 and 1988 the Sanitary District engaged in snow removal operations in the Shawnee-Land Subdivision. Also, some work on buildings located on the common properties have been undertaken as well as some road repairs within Shawnee-Land. As of March 16, 1988 approximately $10,000 has been spent. However, most of the budget is for substantial road improvements and the asphalting which is necessary could not be performed until Spring weather.

* * * *

/s/ John R. Riley, Jr.
JOHN R. RILEY, JR.
County Administrator
County of Frederick, Virginia

Subscribed and sworn to before me, a Notary Public in and for the jurisdiction aforesaid, by John Riley on this 6 day of April, 1988.

My Commission expires July 21, 1989.

/s/ Carol F. Bayliss
Notary Public